IN THE HIGH COURT JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.300 OF 2000

M/s.SOCONORD OCTG,SA. ...Petitioner

vs.

1.Oil & Natural Gas Corporation
and Another. ...Respondents

Mr.Ranbir Kishor @ Santosh Kumar Mishra & K.G.Singhania, Mukta Desai i/b. Singhania & Co., for Petitioner.

Mr.Pradip Sancheti, Sr.Advocate @ Mr.Bhalwal i/b. Vyas & Bhalwal, for Respondents.

CORAM: D.K.DESHMUKH, J.

DATED: 14th January, 2011

P.C.:

1. By order dated 8.2.2002 I had disposed of this Arbitration petition, the Award passed by the learned Umpire was set aside and the

proceedings were remitted back for denovo consideration and decision in accordance with law. The Respondents filed Appeal no.516 of 2002 against that order. The Appeal Court by order dated 2.9.2008 has directed that as by my order I have decided only one issue and remitted the matter back, I should record the findings on the other issues that were urged in the petition. The appeal has been kept pending. Therefore, the matter has been placed before me for recording findings on other issues.

2. The first issue on which I have to record finding is whether the finding recorded by the learned Umpire in the Award that time was the essence of the contract, is a finding which needs to be interfered with by this Court. The learned Counsel appearing for petitioner submitted that Clause 5.2 which is equivalent to Clause 14 of the General Conditions of the Contract provides for claiming of liquidated damages in case of breach of contract. The learned Counsel relied

on the judgment of the Supreme Court in the case of Hind Construction Contractors Vs. State of Maharashtra, AIR 1979 SC 720 submits that the learned Arbitrator has not correctly appreciated that aspect of the matter. In the submission of the learned Counsel, as there is a provision in the contract itself for payment of liquidated damages, time cannot be the essence of the contract. The learned Counsel appearing for Respondents, on the other hand, submits that the entire evidence in relation to the question whether time is the essence of the contract has been considered by the learned Umpire in detail and he has recorded a finding of fact that time is the essence of the contract. As entire evidence has been taken into consideration by the learned Umpire in recording the finding, no interference at the hands of this court is called for. Perusal of the judgment of the Supreme Court in the case of Hind Construction Contractors shows that the law laid down by the Supreme Court in that judgment is merely because there is

recital in the contract that time is the essence of the contract, time does not become essence of the contract.

3. For deciding the question as to whether time is the essence of the contract or not , the other terms of the contract have to be taken into consideration, contemporaneous conduct of the parties has also to be taken into consideration apart from other relevant aspects. Therefore, that the contract provides for claiming of liquidated damages in the event of breach of the contract by itself will not lead to the conclusion that the time is not the essence of the contract. For that purpose, the correspondence between the parties and conduct of the parties will have to be taken into consideration. The learned Umpire has taken this aspect of the matter into consideration in detail and he has referred to the correspondence between the parties, he has also considered the observations of the Supreme Court in the judgment

in the case Hind Construction Contractors and has held that merely because in the contract there is a provision made for the liquidated damages, it cannot be said that time is not essence of the contract. In my opinion, thus the findings recorded by the learned Umpire that time is essence of the contract, is a finding of fact recorded by the learned Umpire after taking into consideration all relevant evidence. The finding recorded by the learned Umpire is a possible finding, and therefore, in my opinion, it cannot be interfered with.

4. It was then submitted that even assuming that time is the essence of the contract and that there has been breach of that contract committed, then also before recording a finding that it is the petitioner who is liable to pay the damages, the learned Umpire should have taken into consideration two letters viz. (i) letter dated 22.6.1992 addressed by the Respondents to M/s.PSL Pipe Coaters Pvt.Ltd. who, according to the

petitioner, was the agent of the Respondents, and (2) letter dated 10.7.1992 written by O.N.G.C. to the same party. It is submitted that in these letters it is clearly stated by the Respondents to O.N.G.C. that if there is any delay in deploying of vessel on the agreed date, it is that party i.e. M/s.PSL Pipe Coaters Pvt.Ltd. who will be liable to pay damages to O.N.G.C. The learned Counsel submitted that these documents were relevant for consideration of question whether it is the petitioner which is liable for damages for the alleged breach of the contract . The learned Counsel appearing for Respondents submits that those letters are not at all relevant for consideration of question whether the petitioner is liable or not . The learned Counsel submits that those letters were written by the Respondents to the above referred party to keep the vessel ready on the agreed date because of the promise made by the petitioner that the material will be made available on the due date for shipping.

5. Perusal of letter dated 22.6.1992 shows that it is clearly stated that the petitioner has confirmed that all the material shall be ready in Antwerp on 14.7.1992 and in Italy on 19.7.1992, and therefore, M/s.PSL Pipe Coaters Pvt.Ltd. were asked to deploy the vessel accordingly. Therefore, the directions issued to that party by the ONGC was based on the promise made by the petitioner that the goods will be available for shipping on due date. And therefore, it was stated that if there is delay in deploying of the vessel on the due date then that party will be liable for damages. Perusal of letter dated 10.7.1992 shows the same thing. Therefore, by those letters that party is to be held liable by the Respondents for delay in deploying the vessel if the goods are made available by the petitioner on the due dates. It appears that as the goods were not made available by the petitioner on the port on the due date, the petitioner has been held liable for damages, and therefore, there is

no question of that party being held liable for payment of damages.

6. Lastly, it was submitted that the learned Arbitrator has declined to calculate the amount of liquidated damages and has only calculated the amount of unliquidated damages and has issued directions for payment of unliquidated damages. The learned Counsel appearing for petitioner relying on the judgment of the Supreme Court in the case of Sir Chunilal V. Mehta and Sons Ltd., AIR 1962 Supreme Court 1314 , specially on the observations found in paragraph 11 submits that as there is a provision in the contract for levying liquidated damages, unliquidated damages cannot be levied. I have heard the learned Counsel appearing for Respondent on this question. In paragraph 17 of the Award, the learned Umpire observed thus:-

> 17. However, in my view, the aspect of correct computation of delay and consequent correct levying of Liquidated Damages becomes really

> academic in this case, inasmuch as, the Respondents have proceeded to claim their loss due to delay and consequent breach of the Contract on the part of the Claimants to the tune of Rs.1,61,26,538/- being the loss suffered by them on account of Foreign Exchange fluctuation only and after adjusting the amount recovered by encashment of the Bank Guarantee against the said loss arising from Foreign Exchange Fluctuation have counter-claimed the balance from the Claimants in their pleadings.

Thus, the learned Umpire held that as the amount of unliquidated damages claimed is higher than the amount of liquidated damages, he is not considering the aspect of liquidated damages and has proceeded to calculate the amount of unliquidated damages and has awarded the same. From the judgment of the Supreme Court in Sir Chunilal s case, referred to above, specially the observations found in paragraph 11 of the judgment, it appears that when there is stipulation for levying of liquidated damages and

the amount of liquidated damages is mentioned, nothing in excess of that amount can be awarded. This aspect of the matter has not been considered by the learned Umpire before making the Award for payment of unliquidated damages. In my opinion, therefore, the matter requires to be remitted back to the learned Umpire for reconsideration of the entire issues firstly, as to whether in view of the stipulation in the contract providing for liquidated damages, unliquidated damages can be awarded. The learned Umpire will also consider the question raised on behalf of the petitioner that while calculating the amount of liquidated damages, whether fluctuation in the rate of foreign exchange can be taken into consideration while arriving at the amount of damages.

Office is now directed to place the matter before the Division Bench with these findings.

(D.K.DESHMUKH,J.)